APPEAL NO. 93447

Pursuant to the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on April 27, 1993, (hearing officer) presiding as hearing officer. He determined that the deceased employee's death occurred on (date of injury), while he was in the course and scope of his employment with employer. Accordingly, he awarded death benefits to the respondent (claimant), who was the surviving spouse, and to the two surviving minor children. Appellant (carrier) appeals urging, in essence, that the evidence is insufficient and that the claimant did not meet her burden of proof: (1) in that the undisputed evidence established that the deceased was shot when he attempted to prevent the theft of his personal vehicle which was a purely personal reason and due to reasons which were not in the furtherance of the deceased's employment; and, (2) in establishing that the deceased had responded to a work-related page message which might have placed him at a greater degree of risk. Carrier also urges error in the hearing officer allowing evidence contrary to the "Dead Man's Statute." Respondent (claimant) asserts that there is sufficient evidence to support the hearing officer's findings and conclusions and that they are not so weak or against the overwhelming weight of evidence as to be clearly wrong or manifestly unjust.

DECISION

Determining that the evidence in support of the hearing officer's finding and conclusion that the death occurred in the course and scope of employment is so speculative and weak as to be clearly wrong and insufficient to sustain his decision, we reverse and render.

This is truly a tragic case involving a relatively young man being shot to death by youths attempting to steal his personal automobile. The deceased was the operations manager for a janitorial service and was given a pager so that, according to his employer, he could contact the deceased at any time. There was evidence that the pager, although it may not have been authorized, was sometimes used for personal communications. In any event, on the evening of (date of injury), a Friday, the deceased left his job and picked up his wife (she had paged him to pick her up on his way home) and went to his home. At about 9:45 p.m. the pager went off and the deceased stated to the claimant, "I have to go answer this call. It is an employee at a building." (This testimony was objected to at the time it was offered as being inadmissible under Rule 601(b) of the Texas Rules of Civil Evidence, the codification of the commonly called Dead Man's Statute.) The parties agreed (there were records admitted on the issue) at the hearing concerning the phone number received on the pager and which number the deceased was returning. The deceased, not having a telephone at his residence, left in his vehicle to go to a pay phone at a near by gas station. Although not entirely clear, the deceased apparently was in the process of using the phone when one of the youths shot and killed him. A statement in the police report by one of the accomplices indicated that perpetrator of the shooting asked the deceased for his automobile and the deceased replied "hell, no!" and was shot.

The location of the phone reflected on the pager at the time of the incident was a private residence occupied by (NQ), his wife and a brother. NQ stated he did not call the deceased's pager on the night in question but that a nephew, (DQ), would sometimes come to his home and use the phone and that he would call "his employer about jobs." He testified that the deceased was his nephew's boss; however, he did not remember or did not know if the nephew was at the house or used the phone on January 31st. The claimant testified that she had met the Q family once or twice but had not socialized with them like having them over for a "barbecue," and although she wasn't sure, she thought the deceased's relationship with DQ was work related. (For some undisclosed reason, DQ was not called as a witness nor was there any statement or other evidence from him.)

The carrier called the owner of the janitorial business, (Mr. C), as a witness. He testified that DQ was not on duty on the night of (date of injury), and that he did not work on Friday nights, and was not scheduled to work that weekend at all. He also testified that the pager the deceased had was only supposed to be used to call the deceased from the employer's office but that he knew it had been used for other calls. He stated that if DQ called the deceased on the evening of January 31st, it would not have anything to do with his work and that DQ would call the office if there was any problem.

The hearing officer determined that the assault on the deceased occurred near his personal residence and not at or near his place of employment, and that the motive for the assault was to steal the personal vehicle of the deceased and not property of the employer. His determination that death benefits were payable hinged on his finding that the deceased went to the pay phone on the night of his death to return a telephone call that was related to his employer's business and "[t]he fact that the decedent was out in the nighttime in furtherance of his employer's business contributed to his risk of being assaulted." He concluded that deceased's death occurred "while he was in the course and scope of his employment."

Initially we note there was no evidence introduced or official notice taken at the hearing that being out in the nighttime to make the phone call contributed to the risk of the deceased being assaulted. There may be some general feeling that one is safer being out in the daytime than at nighttime, and, in a given set of circumstances, there may be an appreciable increase in risk of being assaulted; however, where it is a significant matter in the ultimate decision in a case, the matter should be developed in the record.

Our concern in this case centers around the weakness and lack of probative evidence to establish that the deceased was involved in any activity that would place him in the course and scope of his employment at the time of the deadly assault. Even were

we to assume that the assault was not within the ambit of the exceptions for recovery[1] found in Article 8308-3.02 which provides:

An insurance carrier is not liable for compensation if:

* * * *

(4)the injury arose out of an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment.

we nonetheless find the record lacking in probative evidence, that is, that the evidence is so weak that the deceased was in the course and scope of his employment at the time of the assault that the hearing officer's finding and conclusion cannot be sustained. When reviewing a case for evidentiary sufficiency we consider all of the evidence, both in support of and contrary to the challenged finding. Only if we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust do we reverse. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92108, decided May 8, 1992. And, in reviewing the evidence we are mindful that the claimant has the burden of establishing by a preponderance of the evidence that the deceased suffered an injury in the course and scope of his employment. *See* Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e). The evidence offered to show that the deceased's activity on the night in question was within the course and scope of his employment does not meet that burden. (Carrier complains that one piece of the evidence offered by the claimant on this matter included a statement made by the deceased just before he left the house, and that the admission of such statement was error as being in

[1]North River Insurance Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ) cited by claimant in her reply brief is distinguishable from the instant case in that the intruder in that case, who was entering the plaintiff's room through a window and who the plaintiff pushed out the window resulting in a severe cut to his hand, was not shown by the evidence to have injured or having had an intent to injure the plaintiff. Here, there is no question about an injury having been perpetrated by the assailant. Also, in Purdy, the plaintiff was in a motel away from his home as a direct result of the employer's requirement for travel and the court stated, citing Shelton v. Standard Insurance Co., 389 S.W.2d 290 (Tex. 1965) "[t]he test for determining whether an injury was received during the course of employment when the injury was suffered by an employee whose employer requires him to travel is whether the injury `has its origin in a risk created by the necessity of sleeping or eating away from home. . . .'" In the case before us, there is nothing to indicate that the employer required the deceased to be outside to use a pay phone or make phone calls from any particular location; rather, it is clear that deceased used a pay phone at a service station at his own discretion. *See also*, Commercial Standard Insurance Co. v. Marin, 488 S.W.2d 861 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.) where the court indicated that notwithstanding the statutory provisions concerning intentional third person actions (the same as Article 8308-3.02(4)), the intentional killing of an on-duty employee for purpose of robbing him is an injury in the course and scope. In Marin, the court upheld recovery of benefits where a service station attendant was raped and murdered in the early morning hours as she opened the service station stating such death was a result of an injury sustained in the course and scope of employment where, *inter alia*, there was no hint of any prior relationship between employee and murderer.

violation of the "Dead Man's Statute" which is embodied in Rule 601(b), Texas Rule of Civil Evidence. In view of our holding in this case, we do not need to decide if this provision is applicable or binding in Workers' Compensation contested case hearings recognizing that the rules of evidence are generally not applicable to such hearings. We would note that any error in its admission in this case would not likely be deemed to be prejudicial, under the circumstances, since the statement to the effect that the call was from "an employee at a building" was clearly discredited by the parties' agreement as to the phone number received on the pager by the deceased and the unrebutted evidence that the number was from a private residence.) The other evidence on the issue amounted to little more than speculation or conjecture. The uncle of the person who possibly made a call to the deceased's pager could only testify that DQ occasionally came to his, NQ's, house and that he knew him to make calls to his, DQ's, employer about jobs. There was nothing to indicate that DQ called a pager and then had to wait for a call to be returned to him. NQ was not home the night in question and has no way of knowing if DQ came to his home that night or if he made any call or for what purpose. Although there was evidence that DQ worked on the crew over which the deceased apparently exercised supervision, it was unclear as to their relationship outside of employment. The claimant indicated she had met the family once or twice but did not socialize with them. She did not know about the deceased's relationship with DQ but stated she thought it was work related. The employer, Mr. C, testified that DQ did not work the night in question and was not scheduled for that weekend. And, there was evidence that the deceased received personal calls on the pager. In sum, the evidence to establish that the deceased was acting in the course and scope of his employment at the time of his going to the pay phone is so weak as to render the hearing officer's findings little more than speculation or conjecture or building an inference on an inference: too weak to sustain a determination of injury in the course and scope of employment and upon which to uphold an entitlement to benefits. Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992. When circumstances are consistent with either of two facts and nothing shows that one is more probable than the other, neither fact can be inferred. Litton Industries Products, Inc. v. Gammage, 668 S.W.2d 319 (Tex. 1984). Inference may not be piled on inference to establish a vital fact. Schlumber Well Service Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854 (Tex. 1968). An inference must be based upon fact proven or known to be true and cannot be based upon surmise, speculation, conjecture or mere possibility. Tijerina v. Nerio, 497 S.W.2d 72 (Tex. Civ. App.-Corpus Christi 973) appeal after remand, 508 S.W.2d 672 (Tex. Civ. App.-Corpus Christi 1974, error dism'd). Where testimony is slight and its probative force is so weak that it only raises suspicion of the existence of facts sought to be established, such testimony falls short of being evidence and does not support a verdict. *See* Texas Pacific Coal & Oil Co. v. Wells, 151 S.W.2d 92 (Tex. Civ. App.-Waco 1941, no writ). Accordingly, the decision of the hearing officer is reversed and we render a new decision that the deceased was not injured in the course and scope of his employment and that the claimant is not entitled to death benefits.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would affirm the hearing officer's determination because he was the fact finder and sole judge of the weight and credibility of the evidence and because in my view the record contains sufficient probative evidence to support his decision. The hearing officer, finding among other things that the decedent left his home at about 9:45 p.m. on the date of his tragic demise to drive to a pay telephone at a nearby gas station to return a business related telephone call, and further finding that the fact that decedent's being out in the nighttime in furtherance of his employer's business contributed to his risk of being assaulted, concluded that claimant was in the course and scope of his employment at the time of his death. The evidence showed that the decedent, as a manager and supervisor of the janitorial service whose work was performed after business hours, had supervisory responsibilities and worked seven days a week on an erratic schedule, that he had no telephone at his residence, that employer apparently knew decedent had no telephone at his residence and provided him with a pager unit which was primarily used for business calls, that he received business calls between 6:00 p.m. and 10:00 p.m. approximately once a week, that at about 9:45 p.m. on the date of his death, after he had arrived home from work, he received a call at home on his pager, that he advised his wife he had to return a telephone call of a business nature before leaving the house, that he customarily used a pay phone at a nearby gasoline station, that the telephone number of the call received on his pager was assigned to the NQ residence, and that DQ, an employee whom decedent supervised but with whom he had no social relationship, was said to have used that phone in the past to page the decedent. As I view the evidence, the decedent was in the process of returning a business related telephone call, an act which furthered his employer's business, when he was killed, and the conditions of the decedent's employment, known to his employer, placed him in harm's way at the time of his death.

In Texas Workers' Compensation Commission Appeal No. 92308, decided August

20, 1992, we stated: "We note that different inferences might reasonably be drawn from the evidence but this is not a sufficient basis to reverse a decision where there is some probative evidence sufficient to sustain a decision. (Citations omitted.)" *And see* Commercial Union Assurance Company v. Foster, 379 S.W.2d 320, 322-323 (Tex. 1964). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.) The claimant had the burden to prove by a preponderance of the evidence that her deceased husband's death occurred in the course and scope of his employment. The hearing officer, as the fact finder and sole judge of the weight and credibility of the evidence, was satisfied that she met her burden of proof. I do not view his decision to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 6356 (Tex. 1986).

Philip F. O'Neill
Appeals Judge